Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Patrick Yetman,

complainant,

and

Longshoremen's Protective Union, Local 1953 of the International Longshoremen's Association,

respondent,

and

St. John's Shipping Association Limited.

employer.

Board File: 30206-C
Neutral Citation: 2014 CIRB **709**
January 21, 2014

Parties' Representatives of Record

Mr. Patrick Yetman, self-represented complainant;

Mr. V. Randell J. Earle, Q.C., for the Longshoremen's Protective Union, Local 1953 of the International Longshoremen's Association;

Mr. Glenn L. Etchegary, for St. John's Shipping Association Limited.

On November 7, 2013, Mr. Patrick Yetman (the complainant) filed a complaint with the Canada Industrial Relations Board (the Board), alleging that the Longshoremen's Protective Union, Local 1953 of the International Longshoremen's Association (ILA 1953 or the union) had failed to represent him fairly when it refused to recognize his status as a temporary card holder.

The complaint has been considered by the Board, composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. Robert Monette, and Norman Rivard, Members. Having carefully reviewed the parties' written submissions, the Board has determined that the written record is sufficient and exercises its discretion pursuant to section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) to decide the matter without an oral hearing.

I. Background

[1] The ILA 1953 is the bargaining agent for longshoremen working in the port of St. John's, Newfoundland and Labrador. The longshoremen it represents are subject to a collective agreement that the union has negotiated with the St. John's Shipping Association Limited (SJSA or the employer), which acts as the agent for the stevedoring companies operating in the port. Longshoremen are referred for work in the port through a hiring hall operated by the union.

[2] The complainant worked as a casual longshoreman from 1997 to 2002. During this time period, he also played hockey in various North American minor professional leagues.

[3] In May 2000, the employer and the union entered into a memorandum of settlement (MOS) in order to resolve a number of duty of fair referral complaints that had been filed with the Board by several longshoremen. Among other things, the MOS provided:

> 3. As an interim measure, the ILA 1953 agrees to place fifty-six (56) casuals on a casual priority list. When hiring non-union casuals who appear at a shape-up, the foreman will be required to hire casuals from the casual priority list before hiring other persons.
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> 4. Selection for the casual priority list will be based on total hours worked during the six (6) years prior to January 1, 2000.
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> 5. The ILA 1953 agrees to implement rules that will provide for the progression through the ranks from casual employee to Class A membership. **During the next round of negotiations, the parties agree to establish a temporary card board and the criteria for how a casual employee obtains a position on the temporary card board. The union will establish rules for how a temporary card employee acquires membership in the union as a Class C member.** ...
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> (emphasis added)

[4] As contemplated in the MOS, the parties continued to deal with the issue of casual and temporary card employees. In September 2002, they signed a Letter of Agreement (LOA) providing that fifty-five (55) of the individuals then on the casual priority list would be given

temporary cards. The union also instituted a rule providing that, in order to maintain status as a temporary card holder, the individual was required to attend 50% of the shape-ups for their assigned gang. The purpose of this rule was to encourage regular attendance at the hire-outs, so that the union could provide a workforce sufficient to meet the employers' requirements. Notice of the new rule was posted in the hiring hall.

[5] In September 2002, the complainant was ranked as 46th on the casual priority list by virtue of the hours he had worked prior to January 1, 2002. He was therefore one of the 55 casuals issued with a temporary card in September 2002.

[6] At the next review, conducted in January 2003, temporary card holders who had not achieved the 50% attendance requirement were advised of this fact and provided with an opportunity to submit a written explanation outlining the reasons why they had failed to meet the requirement. The union's evidence indicates that the complainant had not worked any hours between October 2002 and January 2003 and he does not contest this fact. The complainant was invited to submit an explanation for his absence. However, the complainant's explanation was not accepted by the Temporary Status Review Committee (TSRC). The union asserts that the complainant was informed by letter in March 2003 that, on the basis of the information provided, he had failed to meet the criteria and would not be reinstated as a temporary card holder. The only evidence that the union was able to supply to support its submission on this point is a copy of the purported March 27, 2003 letter to the complainant marked "draft". The complainant alleges that this letter was never sent to him.

[7] In August 2003, by vote of the membership, the union amended the hiring hall rules to provide that, in order to maintain their status, temporary card holders had to attend at least 66% of the shape-ups, and attendance would be assessed quarterly. The new rules provided for written warning on the first occasion a card holder failed to meet the criteria, and revocation of temporary card status on the second occasion. However, temporary card holders were permitted to provide a written explanation of the circumstances justifying their absence, which would be taken into account by the TSRC when assessing compliance with the criteria.

[8] The complainant did not work in the longshoring industry in St. John's between October 2002 and August 2013. For much of this time, he was playing hockey in Europe. When

he returned to St. John's in 2013 and sought work in the port, the complainant was informed that he was a casual, not a temporary card holder. However, on the occasions that he worked between August and October 2013, the complainant was paid the rate of pay for a temporary card holder rather than a casual. The complainant wrote to the union and the employer on October 7, 2013, requesting that he be reinstated as a temporary card holder. He informed them that he had never been notified that his status was at risk, as required by the hiring hall rules. In the absence of a favourable response, this complaint was filed on November 7, 2013.

II. Positions of the Parties

A. The Complainant

[9] The complainant states that he was never informed that his status as a temporary card holder was at risk or that the criteria had been changed in August 2003. He states that he did not receive any correspondence from the union regarding the hiring rules, or a warning letter, or a letter advising him that his temporary card had been revoked. He contends that he only became aware that his status had been revoked in August 2013, when he worked for one of the stevedoring companies, Oceanex. The complainant alleges that there is a shortage of longshoremen in the port of St. John's and asks that the Board reinstate him as a "C" Class union member.

[10] The complainant suggests that other temporary card holders were permitted to retain their status despite being absent from the workforce for a number of years, and cited the case of a relative of one of the executive members who he alleges was incarcerated for several years. He submits that an Oceanex representative has advised him that it was never informed that his temporary card had been revoked.

[11] The complainant contends that since he was never given a warning letter or notified that his temporary card had been revoked, his status should be recognized and he should be reinstated.

B. The Union

[12] The union submits that the complaint is untimely, as the complainant has not held a temporary card since March 2003. Payroll records show that the complainant did not attend any

of the shape-ups between October 12, 2002 and January 4, 2003 and thus that his temporary card status was properly revoked in March 2003, in accordance with the rules in effect at that time.

[13] The union contends that the complainant knew, or ought to have known, in early 2003 that his temporary card status had been revoked. It indicates that after January 21, 2003, the complainant's name no longer appeared on the list of temporary card holders. The amendment to the rule that provided for a warning notice did not come into effect until August 2003, after the complainant had lost his temporary card status. The union states that the complainant knew that he had not met the criteria to retain his status after January 4, 2003 (at the time, this meant attending 50% of the shape-ups) and that he absented himself from the stevedoring industry in St. John's between 2003 and 2013.

[14] The union also submits that, even if the complainant had rights in respect of employment in the port in 2003, he abandoned them by failing to exercise these rights and choosing to engage in an alternate career. Consequently, he knowingly failed to meet the criteria required to maintain his status after 2003 as well.

III. Analysis and Decision

[15] Although this complaint was made under section 37 of the *Code* (duty of fair representation), because it involves the operation of a union hiring hall, the Board has also considered whether section 69 of the *Code* (duty of fair referral) applies to the circumstances of this case.

[16] The *Code* requires that a complaint under either of these provisions be made to the Board not more than 90 days after the date on which the complainant knew, or in the opinion of the Board, ought to have known of the circumstances giving rise to the complaint. The complainant alleges that he did not become aware until August 2013 that he had lost his temporary card status in March 2003.

[17] The Board finds it difficult to believe that the complainant could fail to work in the longshoring industry in St. John's for over ten years, and know that he had not paid any ILA 1953 union dues during that time, and yet claim to be unaware of the fact that he was not in compliance with the rules for temporary card status that were in effect at the time that he

obtained that status in September 2002. Nevertheless, the Board will give the complainant the benefit of the doubt and consider his complaint on its merits.

A. Section 37

[18] Section 37 of the *Code* provides:

> 37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[19] In *Powell*, 2000 CIRB 97 and *McDonald*, 2005 CIRB 319, the Board confirmed that two preconditions must be met before the Board is able to entertain a complaint under section 37 of the *Code*: there must be a bargaining agent for a bargaining unit and there must be an employee in the unit who has rights under the collective agreement.

[20] As noted above, the ILA 1953 is the bargaining agent for longshoremen working in the port of St. John's, Newfoundland and Labrador. However, the scope of the bargaining agent's duty of fair representation is limited to the representation of an employee's rights under the collective agreement that is applicable to that employee (see *Vilven*, 2011 CIRB 587; upheld on reconsideration in *Vilven*, 2011 CIRB 615; application for judicial review dismissed by the Federal Court of Appeal in *George Vilven et al.* v. *Air Canada Pilots Association et al.*, A-207-11, January 20, 2012 (F.C.A.)).

[21] The complainant asserts that he is an employee in the bargaining unit, since he once held a temporary card and has been working at the port since August 2013. However, he failed to provide any evidence that he has rights under the collective agreement between the ILA 1953 and the SJSA that have been violated.

[22] The evidence indicates that, in accordance with the LOA between the employer and the union, the complainant was one of 55 casuals issued with a temporary card in September 2002. The collective agreement is silent with respect to the conditions that must be met in order to maintain temporary card status. Those criteria are contained in the union's hiring hall rules rather than the collective agreement. Accordingly, as the complainant cannot point to any rights he has

under the collective agreement to temporary status, the Board must conclude that section 37 of the *Code* has no application to the complainant's situation.

[23] However, even if the complainant had rights under the collective agreement, the Board can find no arbitrary, discriminatory or bad faith conduct on the part of the union. Although a union has certain obligations toward its members, members also have obligations (*Lamolinaire*, 2009 CIRB 463). A union member has an obligation to assist his trade union as it carries out its duties. This includes attending information meetings and making at least minimal efforts to remain aware of developments affecting his interests.

[24] In this case, the union put in place a process that required temporary card holders to requalify each year in order to maintain their status. The existence of this requalification process was well known to longshoremen in the port of St. John's and information regarding it was posted in the union hiring hall. An information meeting was held by the union on September 16, 2002 to explain the system for moving to temporary cards and through the ranks thereafter. The complainant did not attend that meeting and appears to have made no effort to obtain information regarding the rules applicable to his situation. The complainant knowingly failed to meet the annual attendance requirement each year for a period of some 10 years and thereby failed to take the steps necessary to protect his own interests. Even if the Board were to accept that the complainant was not aware of the 2003 rule changes, he had to be aware that he was not in compliance with the rules as they existed when he obtained temporary status in 2002. In light of the complainant's own actions, the position taken by the union when the complainant approached it in August 2013, to the effect that the complainant does not currently hold or qualify for a temporary card, cannot be characterized as arbitrary, discriminatory or in bad faith. On the contrary, the union was simply applying the rules to the complainant in the same manner as they applied to every other temporary card holder.

B. Section 69

[25] Because the complaint involves a hiring hall situation, the Board also considered the provisions of section 69 of the *Code*, which read as follows:

> 69. (1) In this section, "referral" includes assignment, designation, dispatching, scheduling and selection.

(2) Where, pursuant to a collective agreement, a trade union is engaged in the referral of persons to employment, it shall establish rules for the purpose of making such referrals and apply those rules fairly and without discrimination.

(3) Rules applied by a trade union pursuant to subsection (2) shall be kept posted in a conspicuous place in every area of premises occupied by the trade union in which persons seeking referral normally gather.

[26] In *Brewer*, 2000 CIRB 54, affirmed by the Federal Court of Appeal in *Brewer* v. *Halifax Longshoremen's Assn.*, 2002 FCA 42, the Board described its role in a complaint alleging non-compliance with section 69 of the *Code*:

> [44] It is important to describe, at the outset, the scope of this Board's review and the limits that are placed on the Board in reviewing the union's conduct respecting complaints such as those before this Board. The most recent in a series of cases decided by the Board concerning ILA Local 269 and its duty of fair referral is that of *Clarence Hynes et al.* (1988), 75 di 39; and 88 CLLC 16,056 (CLRB no. 708). In that case, the Board reviewed the history of ILA Local 269 as it operated in the Port of Halifax. This was a case that followed two previous cases where complaints from individuals against ILA Local 269 were upheld and the referral system was found to have been unfair. In *Hynes*, a system developed by ILA Local 269 was reviewed and was found to have met the criteria applied by the Board and was found not to have contravened section 161.1 [now 69] of the *Code*. All of those complaints were dismissed.
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> [45] The Board in *Hynes* provides a useful review of earlier Board decisions and some useful statements respecting the scope of the Board's inquiry and the nature of the union's obligation under section 69 of the *Code*. It reviewed the Board's comments in *David C. Nauss and Peter H. Roberts* (1981), 43 di 263 (CLRB no. 313), which described the Board's somewhat hands-off approach as follows:
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> > Under the *Code* it is not the Board's responsibility to write rules or administer them, although that is a remedial course of action available under sections 189 and 121 of the *Code*. That is the task of the unions. The Board must ensure the rules are fair and non-discriminatory and administered in a fair and non-discriminatory manner. That does not mean the Board must or can choose or decide which side of a debate over what is a useful or good or desirable rule will prevail. There are many conflicting views over how referral rules should operate in any circumstance. In all rule making processes there are several clashing interests and points of view. The Board is not the rulemaker and does not decide which interest and point of view will prevail. The Board is not a refuge for those whose views do not prevail when the rules are made.
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> > (pages 268-269)
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> [46] The Board in *Hynes* then reviewed the statement from *Donald J. Jollimore* (1982), 48 di 63 (CLRB no. 368), which reads as follows:
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> > It appears that the success of Messrs. Nauss and Roberts' complaints before the Board has inspired others on the waterfront to pluck up the courage to show their dissatisfaction. It should be known that this Board does not sit in appeal to decisions taken by the union or its executive. Also, we are not a short cut to union membership or a position on the card board. The dispatch rules and membership rules which are now in effect were not imposed upon the union by this Board. They were democratically arrived at through the union's internal process and, notwithstanding any defects or

> dissatisfaction, those rules govern the local practices and everyone must abide by them. Unless someone can show that the rules are in themselves discriminatory or that they are applied in a discriminatory manner then this Board will not intervene in the union's internal affairs.
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> (page 68)

[47] These statements make it clear that it is not the Board's role to assess whether the rules in question here are good rules, the best rules or whether other rules would have been more appropriate. Clearly, the Board's only role is to evaluate the process by which the union developed and applied the Rules to determine whether, in its view, the Rules were fair and non-discriminatory and were administered in a fair and non-discriminatory manner.

[48] In making that assessment, the Board must be mindful of what it means to be fair and non-discriminatory. The Board has adopted the definition or test outlined many years ago by the Nova Scotia Labour Relations Board in *Daniel Joseph McCarthy*, [1978] 2 Can LRBR 105, which provided the following statement:

> In our opinion the word "discriminatory" in this context means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by the *Human Rights Act*, S.N.S., 1969, c. 11, as amended; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy itself is one that bears no fair and rational relationship with the decision being made. ...
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> (page 108)

[49] This test, as restated in *Hynes*, is now well established as the test that this Board will apply in reviewing the union's obligations under section 69 of the *Code*. This Board's review will therefore be based upon an assessment of whether the Rules, as established by the union and applied in this case, are illegal, arbitrary or unreasonable.

[27] Consequently, the Board's role in a complaint alleging non-compliance with section 69 of the *Code* is to evaluate the process by which the union developed and applied the rules to ensure that the rules are fair and non-discriminatory and are administered in a fair and non-discriminatory manner.

[28] The rules under which the complainant was granted a temporary card were adopted in September 2002. The complainant does not suggest that he was unaware of what those rules were at the time. The rules were amended in 2003 and the complainant is clearly aware of the content of the 2003 rules, since he makes reference to them in his complaint. As required by section 69(3), the rules are posted in the hiring hall.

[29] The Board dealt with complaints about the fairness of the 2002 and 2003 rules in *Yetman*, 2004 CIRB LD 1145 (*Yetman 1145*). In dismissing a number of complaints that had been filed by various groups of longshoremen, the Board made the following observations:

> Mr. Andrew Yetman challenges the 2000 MOA and contends that the "A" members ratified the agreement without fully understanding what it meant to their status. He argued that an increase in the number of "A" members means less work for the more senior "A's". It may very well have been that the full import of the 2000 MOA did not settle upon Mr. Yetman until sometime after it was implemented but this does not constitute a violation of the *Code*. Mr. Yetman is asking that the union do the very thing that others have criticized and challenged - close the union doors. There is little doubt that if the union complied with Mr. Yetman's request, it would be inundated with complaints and allegations of discriminatory conduct and policies. The Board also finds that Mr. Yetman's complaint is well beyond the 90 day time limit and, similar to Mr. McCormack, if not dismissed on the merits it would not have been considered as timely.
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> It was Mr. William Yetman's position that the union violated the *Code* when it raised the hire-out requirements to 66%. He described this as an attempt to keep him out of the union. The Board finds that the evidence does not support Mr. Yetman's contention. The change was introduced not to keep individuals out of the union but rather to encourage their regular attendance at the hire-outs to ensure the union provides the necessary workforce to meet the employer's needs and requirements.
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> Mr. Penney and Mr. Stanchfield shared similar concerns about the method chosen by the union to move temporary employees to "C" status. Both complainants submitted that relying upon the hours from 1994 to 1999 meant the system was flawed as the hours were accumulated through nepotism. The complainants would have the Board ask "Was there another means the union could have used to select "C" members? Was the method chosen the best method?" It is not necessary, however, for the Board to answer either question. The obligation upon the union is not to implement the 'perfect' policy but to ensure the process is fair and not discriminatory. The union has not denied that there were problems in the past and the Board accepts that it is working to reduce and eliminate the impact of the past practices on the waterfront. It is the finding of the Board that the union's policies are not in contravention of the *Code*.
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> Unions are often faced with the task of attempting to satisfy the conflicting and sometimes competing interests within its membership. The complaints in this case are expressions of personal dissatisfaction with the manner by which the union has admitted employees to membership within the union. Although they reflect a degree of self-interest, this should not be read as a finding on the part of the Board that the complainants were not concerned about their union or the other members. It is, in fact, the opinion of the Board that the complaints were prompted by a belief that there was a better way in which to conduct the union's internal concerns. Whether this was actually the case, is not something the Board need decide. As bargaining agent for the membership, it is up to the union to determine how best to operate the hiring hall provided, of course, it does so in a manner which is not contrary to the *Code*. If, however, a majority of the members do not support the union's actions, they may exercise their democratic prerogative at the appropriate time and thus make their position known.

> What has taken place at the Port of St. John's represents the growth of a union and the attendant evolution of the hiring hall rules. The Board is satisfied that the ILA throughout has attempted to serve its membership to the best of its ability. Its decisions may not always have been the best but that is not a requirement of the *Code*. What is, however, evident to the Board is that there was a desire and an attempt on the part of the ILA to be fair to its members. Were nepotism and favouritism a part of the past on the St. John's waterfront? Perhaps, but the Board is satisfied that the conduct and actions it was called upon to review were undertaken not to foster or promote nepotism and discrimination but rather were implemented in an attempt to eliminate the vestiges of these practises from the waterfront.
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> (pages 10–11)

[30] As the Board has already ruled on the fairness of the 2002 and 2003 rules adopted by the ILA 1953, that issue is *res judicata* and the Board need not review this question again. The only remaining issue in this case is whether the rules were applied to the complainant fairly and without discrimination.

[31] The complainant alleges that the union's President favoured his brother-in-law and next door neighbour by helping him to keep his temporary card although he had only attended 7% of the hire-out opportunities in 2002–03. The complainant asks how a member could hold a position in which he was expected to show up 66% of the time when he was incarcerated. He alleges that the TSRC made the decision to allow that individual to keep his status because of family relations. The complainant suggests that, had he been incarcerated rather than playing hockey during the 10 years he was away from St. John's, he would still be a union member with rights.

[32] The Board has no evidence regarding the circumstances of the individual that the complainant alleges received special treatment. However, it notes that the TSRC is composed of representatives of both the SJSA and the ILA 1953, so any decisions regarding the maintenance of temporary status are not made solely by the union. As well, the rules contain a provision for exemptions from the attendance requirements based on an explanation acceptable to the TSRC. The complainant has not provided any evidence to suggest that he requested a similar exemption for the years that he was away from St. John's.

[33] The complainant states that he was under the understanding that, once he was on the priority list and assigned to a gang, he would always remain a part of that gang. He states his belief that union members can stay away for countless years and come and go from their positions as they wish, and that he felt temporary card holders could do the same. If this indeed was the

complainant's understanding, he should have verified the facts in 2002, before he left St. John's to take up other employment. The complainant's misapprehension of the rules relating to temporary card holders certainly does not vest him with any of the rights he is claiming.

[34] In the Board's view, nothing turns on whether the union actually sent the March 27, 2003 letter to the complainant advising him that he had lost his status as a temporary card holder. Under the rules in effect at the time, the union was under no obligation to warn the complainant or to send him a written notice regarding the termination of his temporary card status. The complainant was fully aware that he had not met the attendance criteria and he cannot now, more than 10 years later, assert an entitlement to rights that he has not held since March 2003.

[35] As the Board noted in *Yetman 1145*, the change to the rules that the union introduced in 2003 was not intended to keep individuals out of the union, but rather to encourage their regular attendance at hire-outs so the union could provide the necessary workforce to meet the employer's needs and requirements. The Board finds that the union applied the rules regarding temporary cards to the complainant in a manner consistent with this purpose. In the Board's opinion, based on the evidence before it, the rules were applied to the complainant fairly and without discrimination.

[36] For all of these reasons, the complaint is dismissed.

Elizabeth MacPherson
Chairperson

Robert Monette
Member

Norman Rivard
Member